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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a constitutional doctrine of executive discretion by which the Executive Branch is free to decide the extent to which it will meet requirements of a Consent Decree against the United States.

2. Can the Executive Branch, consistent with a Consent Decree requiring the United States to "make every good faith effort to find and provide every available form of financiai resources" for implementation of a school desegregation plan, lobby against legislation to appropriate funds for the Plan.

3. Can the Judicial Branch require the Executive Branch to take affirmative action to remedy past violations of the Consent Decree.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Board of Education of the City of Chicago respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. 1a-17a) is reported at 744 F.2d 1300. The findings of fact and conclusions of law of the District Court (App., infra, pp. 18a-215a) are reported at 588 F.Supp. 132. The remedial order of the District Court which was appealed by the United States to the Court of Appeals (App., infra, pp. 216a-233a) is reported at 592 F.Supp. 967.[1]

[1] Earlier findings of fact and conclusions of law of the District Court in this case, together with an accompanying order (App., infra, pp. 234a-268a) are reported at 567 F.Supp. 272 and the prior opinion of the Court of Appeals (App., infra, pp. 269a-281a) is reported at 717 F.2d 378.

JURISDICTION

The judgment of the Court of Appeals (App., infra, p. 297a) was entered on September 26, 1984. A timely petition for rehearing was denied on November 30, 1984. (App., infra, p. 298a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, Section 1 of the Constitution of the United States provides in pertinent part: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, Section 2 states in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and ... to Controversies to which the United States shall be a Party;..."

Article II, Section 3 provides in pertinent part: "[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient;...."

Public Law 98-107, Section 111 (97 Stat. 742) [the "Yates Bill"] provides:

> There is hereby appropriated $20 million to be derived by transfer from funds available for obligation in fiscal year 1983 in the appropriation for "Guaranteed Student Loans," to remain available for obligation until September 30, 1984, to enable the Secretary of Education to comply with the Consent Decree entered in United States District Court in the case of the *United States of America* against the *Board of Education of the City of Chicago* (80 C 5124) on September 24, 1980.

This case also involves certain other statutes and regulations of the United States Department of Education, the pertinent texts of which are set forth in the Appendix. The citations for these are: 42 U.S.C. § 2000c-4 (App., infra, p. 299a); 20 U.S.C. § 3815 (App., infra, p. 299a); 20 U.S.C. § 3832 (App., infra, p. 300a); 20 U.S.C. § 3851 (App., infra, p. 302a); Public Law 98-139, Title III (App. infra, p. 303a); Public Law 98-619, Title III (App., infra, p. 305a); and 34 Code of Federal Regulations Part 760 (App., infra, pp. 307a-318a).

STATEMENT

This case arises from a Consent Decree for the desegregation of the public schools in Chicago, Illinois. The present proceeding raises important legal issues concerning the relationship between the judiciary and the other branches of the federal government. It concerns the constitutional power of the judiciary to enforce consent decrees against the United States. It also involves the extent to which obligations under consent decrees by which the United States is bound are nonetheless subject to the discretionary decisions of the Executive Branch.

On September 24, 1980, the United States filed a complaint in the United States District Court for the Northern District of Illinois against the Board of Education of the City of Chicago (the "Board"), alleging that its schools were racially segregated. (App., infra, 269a) The complaint asked for an order requiring the system-wide desegregation of schools. The District Court had jurisdiction of the case under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3).

Simultaneously with the filing of the complaint, the United States and the Board presented a Consent Decree to the District Court which was entered on the same day.[2] The Decree did not

[2] The Decree is reproduced at App., infra, pp. 282a-296a.

itself contain a plan of desegregation, but under it the Board was obligated to develop and implement a system-wide desegregation plan. The Board, which serves over 400,000 students, is the largest school district to have been the subject of a Federal court order requiring system-wide school desegregation. (App., infra, 26a)

The Decree had two objectives: maximizing the number of white and minority children attending school together given the demographics of the Chicago public schools, and the implementation of compensatory educational programs in schools expected to remain racially isolated. It took into account the anticipation of the Board and the United States that a plan to accomplish these goals would be expensive. Given its state of severe financial distress, the Board had made clear to the United States that it would need federal financial assistance in order successfully to implement the system-wide desegregation plan required by the Decree. (App., infra, p. 31a) Accordingly, under Section 15.1 of the Consent Decree the United States and the Board each agreed and are obligated

> to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The United States' financial commitment under Section 15.1 was a key reason that the Board agreed voluntarily to implement a desegregation plan.[3] (App., infra, p. 31a)

At the time the Consent Decree was entered, the United States had an extensive program of federal assistance for local school districts implementing school desegregation plans.

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[3] The Board had otherwise planned to counterclaim against the United States for its role in segregating the Chicago schools (such as in promoting segregated public housing). (App., infra, p. 27a) See e.g., *Hills* v. *Gautreaux*, 425 U.S. 284 (1975). To the extent that the United States had been found liable on these counterclaims, it would have been required to assist the Board in financing its desegregation plan.

(App., infra, p. 1a) However, it was clear from the language of Section 15.1 that the obligations of the United States were not limited to particular existing programs, but encompassed any and all funds which were or could be made available for assistance to the Board's plan. (App., infra, p. 32a) Thus, under the Decree the obligation of the United States was to "make every good faith effort" to find and provide funds to the Board regardless of the particular funding arrangements which would pertain from time to time.

The desegregation plan (the "Plan") which was developed by the Board in 1981 and 1982 sought to produce the greatest practicable number of physically desegregated schools. This result was to be achieved by educational programs and techniques which would attract children to integrated and desegregated schools, without requiring mandatory reassignment of children. (App., infra, p. 49a) Because of the small proportion of white children in the Chicago schools[4] (less than 15.6% in school year 1984-85), it was also recognized in the Decree and the Plan that a significant number of schools would remain racially isolated — predominantly minority in enrollment. (App., infra, p. 31a) For children in these schools — for whom a desegregated education (in the sense of having black and white children in the same school) was not possible — the Plan provided for substantial compensatory educational remedies. These remedies were designed to ameliorate the effects of past segregation on black and Hispanic children attending these schools. (App., infra, p. 113a) *See Milliken* v. *Bradley*, 433 U.S. 267 (1977).

The United States closely monitored the Board's development of the Plan. Both its pupil assignment and educational remedies were praised and endorsed by the United States.

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[4] Supp. App., infra, p. S-1. Since school year 1983- 84, the level of white enrollment has declined slightly. This decline was projected by the Board and was the subject of testimony before the district court.

(App., infra, pp. 40a-44a, 51a) The Plan was approved by the District Court on January 6, 1983. Objections by various groups seeking to intervene were denied. No appeal was taken from that judgment.

The Plan involves considerable expense, both for its educational and student assignment portions. The District Court found that for the 1984-85 school year the level of funding required for implementation of the Plan is approximately $171 million. (App., infra, p. 222a) It also found that despite the Board's best efforts to provide funding for the Plan, the Board would be unable to fund approximately $103 million of those costs. (App., infra, p. 224a) Through the 1983-84 school year, the Board itself had spent approximately $120 million for Plan implementation.

At the same time the Board was preparing its Plan, and notwithstanding the United States' obligation under Section 15.1, the Executive Branch, including particularly the Department of Education, determined that no material financial assistance should be provided by the Federal government to the Board for its desegregation programs. The Department sought generally to discontinue such assistance for all school districts. With respect to the Board, it did not make any efforts to seek alternative funds or find other means to abide by the Consent Decree obligations to which the United States had agreed. (App., infra, pp. 132a-136a, 138a, 198a-200a) Indeed, the Executive Branch has been unremitting in its determination not to provide financial assistance to the Board, not only by refusing to make "good faith efforts" to find and provide funds but also by taking efforts to ensure that the Board would not receive funds that otherwise would have been available. (App., infra, pp. 132a-139a, 144a-145a) It is this renunciation by the United States of its financial obligation to that gives rise to this Petition.

The failure of the Executive Branch to comply with Section 15.1 of the Consent Decree has been evidenced both by

decisions of the Department of Education as to the use of moneys appropriated to it by Congress for purposes including desegregation assistance, and by the Executive Branch's recommendations and activities with respect to potential or pending appropriation bills.

Before 1982 the major source of funding for federal desegregation assistance had been the Emergency School Aid Act ("ESAA"). (App., infra, p. 238a) At the instigation of the Department of Education, this Act was repealed, effective July 1, 1982. Together with a number of other categorical grant programs, ESAA was replaced with a program of educational block grants to the states. (App., infra, p. 237a) *See,* Devins and Stedman, NEW FEDERALISM IN EDUCATION: THE MEANING OF THE CHICAGO SCHOOL DESEGREGATION CASES, 59 Notre Dame Law. 1243 (1984).

This change did not mean that federal funds in the block grant program could not have been allocated to the Board for the Plan. In fact, the block grant authorizing legislation permits the Secretary of Education to require states, in distributing funds to local districts, to apply a priority which ensures that districts receive assistance in meeting their constitutional obligations to desegregate schools. (*See* 20 U.S.C. § 3815) However, the Secretary did not require any such priority, either generally or specifically with respect to the Board, notwithstanding the Consent Decree's "every good faith effort" requirement. And the State of Illinois has not applied any such priority in allocating funds it receives under the block grant program. (App., infra, pp. 108a-110a, 239a-240a)

Enactment of the block grant legislation, moreover, did not foreclose the ability of the United States to find and provide other direct financial assistance for the Plan. For the period from the District Court's approval of the Plan through the current school year, Congress in each year has appropriated substantial sums of money to the Department of Education for purposes which lawfully included financial assistance to local

school districts for desegregation programs. These include funds which were appropriated for desegregation training and planning programs authorized under Title IV of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000c-2 - 2000c-4) ("Title IV"). Over $24,000,000 was appropriated for this purpose in fiscal years 1983 and 1984. (App., infra, p. 123a)

Also among these funds were appropriations to the Secretary's Discretionary Fund. (App., infra, p. 126a) The Discretionary Fund authorizing legislation specifically allows a portion of these appropriations (over $18,040,000 in fiscal year 1984) to be used for grants to local school districts for desegregation purposes. (20 U.S.C. §§ 3832(3) and (7), 3851(a)) As to these appropriations, the Secretary has in each year determined not to spend them to provide direct desegregation assistance to the Board. He has chosen instead to allocate all Discretionary Fund money for purposes other than desegregation and to make no direct grants of Title IV desegregation funds to local school districts. (App., infra, pp. 237a-238a, 123a-124a, 134a-135a)

Moreover, in each fiscal year in question substantial amounts were appropriated generally in a lump sum to the appropriations account containing the Title IV subaccount. (App., infra, p. 128a) To the extent he determined appropriate, sums could have been "reprogrammed" by the Secretary,[5] without further Congressional approval, for distribution to

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[5] Reprogramming is a well-established federal budgetary practice. Where Congress appropriates funds generally (or in a lump sum) to one appropriation account, the Executive Branch is permitted, without seeking further congressional approval, to allocate these funds as it chooses among the programs comprising the account. See e.g., *International Union, United Automobile, Aerospace, Etc. Workers v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984). For example, the Secretary could have allocated or "reprogrammed" funds from the other programs in the same account as Title IV into the Title IV program. Once reprogrammed into the Title IV program, these funds could have been distributed to the Board for desegregation assistance.

school districts through the Title IV or other programs. (App., infra, p. 128a-129a) As to these "reprogrammable" appropriations, the Secretary in each case has declined to reprogram the funds for use by the Board.

As to Title IV and other "reprogrammable" appropriations, the Executive Branch has in each year since 1982, asked Congress not to appropriate amounts for these purposes. After amounts were appropriated, it asked Congress to rescind the appropriations, and when this was not done, the Secretary of Education determined not to spend any of the funds for implementation of the Plan (or other direct desegregation assistance to school districts). He has instead, within the authorized scope of the appropriations, determined to use all of the appropriations for other purposes.

In short, the Secretary has decided that no financial assistance should be provided for the Plan. He chose in virtually every case to spend appropriated money on purposes other than for assistance to the Board. The result of his actions is that the Board has received no material financial assistance from the United States even though funds were undeniably available. This is consistent with the United States' contention that it has no judicially enforceable obligation to provide any amount of available financial assistance to the Board and that it is constitutionally free, regardless of Decree, to decide how to spend all money which Congress has given it discretion in allocating.

In addition to these administrative steps, the Executive Branch has persistently declined to take further good faith efforts to find funds by seeking legislation which could provide other assistance to the Board, including reappropriating lapsing appropriations which the Department did not spend during a fiscal year.[6] (App,. infra, p. 135a-136a) Similarly, the Execu-

[6] In contrast to reprogramming, reappropriation is a practice by which funds from one appropriation account are transferred into a

(Footnote continued on following page)

tive Branch has contended that it is constitutionally free to engage in lobbying activities to influence the amount of desegregation funding to be appropriated by Congress both generally and for the Board, specifically without judicial limitation and regardless of the Decree. (App., infra, pp. 8a, 15a, 217a-218a) Thus, the United States has asserted that despite the Consent Decree, it is within the constitutional discretion of the Executive Branch to lobby against passage of legislation which would make desegregation funds available specifically to the Board and to lobby in support of legislation which would render otherwise available Department of Education appropriations unavailable for the Plan. (App., infra, p. 8a, 15a, 217a-218a)

District Court-First Decision

After repeated unsuccessful requests to the United States for it to undertake a plan to find and provide available funds, the Board petitioned the District Court to enforce the Decree. On June 30, 1983, after an evidentiary hearing, the District Court found that the United States had violated Section 15.1 of the Consent Decree.

The District Court held that the United States was obligated under the Decree to take every affirmative step within its legal authority to find and provide financing for the Plan. (App., infra, pp. 254a-255a) It found that the United States had failed to meet this obligation (1) by failing to make available to the Board amounts appropriated for programs under which the Secretary of Education could lawfully provide assistance for the Plan, (2) by not utilizing its statutory

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(Footnote continued from preceding page)

second appropriation account. After this transfer, the reappropriated funds may be spent for any of the programs authorized in the second account. Because separate appropriation accounts are involved, congressional action is required to effect such a transfer or "reappropriation" of funds. (App., infra, p. 180a)

authority to reprogram unallocated or unspent appropriations for desegregation programs in general, or for the Plan specifically and (3) by not taking steps to assure that the allocation by Illinois of federal educational block grant funds took into account the desegregation needs of the Board. (App., infra, p. 239a)

The District Court accordingly ordered the Executive Branch of the United States "to undertake immediately an active and affirmative program of making every good faith effort to find and provide every available form of financial resources adequate" for the Board's Plan. This program was to include efforts to provide funds that under the terms of Congressional appropriations were available for local desegregation assistance. It also was to include efforts as necessary to secure Congressional approval for reappropriation of unspent moneys originally appropriated to other accounts of the Department of Education and efforts to initiate or support other legislative actions to obtain financial resources for the Plan. (App., infra, pp. 260a-261a)

Court of Appeals-First Decision

The United States appealed the decision of the District Court. On appeal, the Court of Appeals rejected the contention of the United States that its obligation under the decree was limited to helping the Board submit funding applications — providing, as it were, a catalog to federal domestic assistance programs. (App., infra, pp. 275a-276a) Indeed, the Court of Appeals held that "¶ 15.1 imposes a substantial obligation on the government to provide available funds to the Board". (App., infra, p. 276a)

The Court of Appeals affirmed the District Court's finding that the United States had failed to obey the Consent Decree. It did so on the ground "that the United States had funds available for use by the Board but failed to provide them to the

Board". (App., infra, pp. 276a-277a) It avoided, however, deciding that the Decree was violated by the effects on the Board of policy decisions made by the Executive Branch. These policy decisions included requesting Congress to reduce or restrict the use of appropriations, replacing categorical federal assistance programs with educational block grant to states and failing to take steps to find other funds for the Board in lieu of the funds made unavailable. The Court of Appeals stated that "a significant constitutional issue may exist as to whether a finding of lack of good faith can be based upon such a series of sweeping Executive policy decisions and recommendations". (App., infra, p. 276a)

The Court of Appeals also vacated the remedial portion of the District Court's order. It remanded the case, directing the District Court to verify the amount of federal funds which were available to the Board and to afford in the first instance the United States an opportunity to fashion its own plan to remedy its violations. (App., infra, pp. 280a-281a)

The Yates Bill

After the first decision of the Court of Appeals, Congress took steps to appropriate money specifically for the Plan. At this point, however, the Executive Branch took the view that the Consent Decree did not constitutionally inhibit its activities with respect to providing or not providing desegregation assistance to the Board and affirmatively opposed measures designed specifically to provide assistance for the Plan. It lobbied against a bill sponsored by Congressman Yates which, in recognition of the United States' obligation under the Decree, would have appropriated funds for the Plan. (App., infra, pp. 139a, 144a) When this bill nonetheless passed Congress, it was vetoed by the President. The President's veto message sharply stated the constitutional issue in the case:

> This veto is not premised on a desire to protect the Federal budget. It is based upon my conviction that the Con-

> stitution and its process of separated powers and checks and balances does not permit the judiciary to determine spending priorities or to reallocate funds appropriated by Congress. Those are exclusively the functions of the Legislative and Executive branches, and the use of judicial decrees to assume such powers raises problems of constitutional significance.

(19 Weekly Comp. Pres. Doc. 1133, Aug. 13, 1983)

Subsequently, the text of the Yates Bill was inserted as a rider to other critical appropriation legislation affecting several departments in the Executive Branch. The Executive Branch continued to lobby against the Yates Bill and also lobbied for an amendment to it which would have provided that no funds other than those appropriated by the Yates Bill could lawfully be granted by the Department to the Board. (App., infra, pp. 139a-141a, 144a) While this amendment was defeated, a version of it—the Weicker Amendment—was enacted at the time the Yates Bill became law. Thus the Board received, over the persistent opposition of the Executive Branch, a grant of $20 million for the Plan for school year 1983-84. This is the only material financial assistance which has ever been provided by the United States for the Board's Plan and it was vigorously opposed by the Executive Branch.

Plan of the United States

After the first remand of the case by the Court of Appeals, the United States continued to refuse to provide to the Board any of the fiscal year 1983 or 1984 funds which had been appropriated for desegregation purposes (save for the Yates appropriation, as to which it did not argue that it had a choice). (App., infra, pp. 144a-145a) In response to the direction of the District Court, the United States presented a document purporting to demonstrate its compliance with the Consent Decree. (Plan of the United States, filed November 10, 1983) This "plan" stated that the Board would be given a competitive

priority in the distribution of funds under any desegregation programs that the Department elected to fund, subject to criteria established by statute and other regulatory criteria as the Department chose to adopt. (*Id.* ¶3) However, the United States did not specify that, in the absence of a direct statutory mandate, there would be any such programs. Indeed, it stated that no such programs existed. (*Id.* ¶1) Moreover, it continued to assert that it maintained unrestrained discretion as to whether or not to undertake legislative activities to seek other additional funds for the Board. (*Id.* ¶5)

Remand Proceedings in the District Court

Upon remand, and after a subsequent evidentiary hearing, the District Court entered extensive further findings as to the costs of the Plan, as to the ability of the Board to provide funding for the Plan, as to the amount of funds available to the United States to provide assistance to the Board under appropriations by Congress and as to the lobbying and other legislative activities of the Executive Branch with reference to that assistance. (App., infra, p. 18a et seq.)

The District Court found that the United States had continued to violate the Consent Decree by failing to provide appropriated funds to the Board, by not "reprogramming" other funds for this purpose, and by not seeking to make other alternative funds available for the Board's plan. (App., infra, pp. 198a-199a) It also held that under these circumstances the failure of the Executive Branch to seek an appropriation of funds for the Board and its direct lobbying to make funds unavailable constituted bad faith in violation of the Consent Decree. (App., infra, pp. 196a-197a, 199a)

The District Court afforded the United States time to file a new plan, and when it failed satisfactorily to do so, entered its Remedial Order. That Order was, as it stated, designed to compel the United States to meet its obligations under the Consent Decree. (App., infra, p. 220a)

The Remedial Order required the Executive Branch to take those steps within its control to provide financial assistance to the Board. Thus it was directed immediately to provide to the Board those funds which had been appropriated by Congress for purposes which included assistance to local districts for desegregation, and which had not been committed to other grantees. (App., infra, p. 227a) The Order further required the Secretary of Education to identify all lawful steps necessary to require the State of Illinois to allocate for desegregation assistance the discretionary portion of the educational block grant funds received by the State. (App., infra, p. 230a) The Remedial Order also directed the United States to seek legislation to reappropriate unspent appropriations for use for the Plan. (App., infra, p. 229a)

In addition, the District Court ordered the United States to prepare each year an affirmative program to seek to provide up to $103 million to the Board for each year of the Plan and to take such administrative steps and make such recommendations to Congress as would be appropriate to secure that funding. (App., infra, pp. 224a, 225a, 228a)

The Remedial Order also concluded that the Executive Branch had "poisoned the well" for further Congressional action with respect to the Consent Decree by its persistent efforts to eliminate or limit the availability of funds. (App., infra, p. 225a) The District Court thus determined that the Executive Branch had placed itself in a position in which it could not prospectively comply with the Decree. (App., infra, p. 225a) Indeed, it had taken substantial steps to disable the United States—which has a specific financial obligation under the Decree — from being able to abide by its terms. To remedy this violation, the District Court declared that the United States (not simply the Executive Branch) had an unconditional obligation to provide the Board with the approximately $103 million needed for implementation of the Plan in 1984-85. (App., infra, p. 225a) The Court avoided, however, ordering

any actions by the United States to implement this particular declaration of obligation.

The Second Court of Appeals Decision

On appeal from the Remedial Order, the United States contended that the doctrine of separation of powers entitled the Executive Branch to exercise discretion so as to provide none of the appropriated money to the Board, and thus that the Consent Decree did not restrain that discretion in any way. (App., infra, p. 8a) It also argued that this doctrine, as well as the political question doctrine, prohibited the District Court from considering or entering any order as to the legislative activities of the Executive Branch. (App., infra, p. 8a, 15a) Because of what it asserted were the significant constitutional issues involved, the United States requested an *en banc* hearing:

> This [Remedial] order raises the most profound issues concerning basic separation of powers principles and the authority of the judiciary to direct the specific operations of the Executive Branch, including the Executive's relations with Congress. It also involves serious questions regarding the Secretary of Education's fund allocation authority under a grant statute intended to benefit multiple grantees and the ability of the judiciary to interfere with the Secretary's implementation of such legislation.

(Suggestion of the United States for Initial *En Banc* Consideration, filed August 23, 1984, at p. 3.)

In its decision, the Court of Appeals vacated the Remedial Order and remanded the case for a third evidentiary hearing. (App., infra, p. 17a) The Court of Appeals held that the Consent Decree did not significantly, if at all, restrain the discretion of the Executive Branch in deciding whether or not to provide the Board any specific amounts appropriated for desegregation programs. Instead, it stated that the obligation of the United States would be satisfied if the Board were merely to

> be funded on a priority basis under existing school desegregation programs, the amount of which funding is determined by program criteria and is subject to the review of the district court.

(App., infra, p. 11a) The Court of Appeals did not, however, indicate that the Secretary's power to select these criteria and apply them is in any way constrained by the United States' obligations under the Consent Decree. Thus it did not suggest that the Executive Branch needs to make any appropriated money available for desegregation activities, either for the Board alone or for the Board sharing with other school districts. In effect, the Court of Appeals held that a consent decree judgment cannot compel the Executive Branch to spend appropriated funds in a particular way.

Indeed, the Court ruled specifically that it was not a bad faith violation of the Decree for the United States to make general policy decisions as to the use of funds appropriated for purposes which include desegregation programs, even where those decisions result in no money being available for financial assistance to the Plan, and even where no good faith efforts were taken otherwise to provide financial resources for the Plan. (App., infra, p. 14a)

For example, as to the decision of the United States not to use money appropriated under Title IV to provide direct grants to the Board, or for school districts generally, the Court held:

> This policy decision applies to all school districts and does not indicate intent on the part of the United States specifically to avoid its obligation under ¶ 15.1.

(App., infra, p. 14a)

Similarly, it was held not a bad faith violation for the Secretary of Education to adopt regulations which permitted virtually none of the Discretionary Fund moneys to go to the Board for desegregation activities. Nor did it find it a bad faith violation for the Secretary not to "reprogram" appropriations for the Board's Plan. (App., infra, p. 14a)

The Court of Appeals' decision obviously derived from its concern that Article II, Section 3 of the Constitution shielded the Executive Branch from constraints on its general policy discretion as regards the Board, notwithstanding the existence of a "substantial obligation" under the Consent Decree. Indeed, it was precisely such broad policy decisions which the Court of Appeals had held presented a "significant constitutional issue" in its first decision. (App., infra, p. 276a)

Secondly, the Court of Appeals held that the Consent Decree could not under any circumstances require the Executive Branch to try to make funds available for the Plan by legislative activity, including a simple request to Congress that it appropriate funds for the Board in recognition of the Decree. Further, the Court of Appeals criticized the District Court for not having been more sensitive to comments in its first opinion in which it set forth what it considered serious constitutional obstacles to such a requirement. Thus, the Court of Appeals held that a consent decree judgment cannot constitutionally bind the Executive Branch to seek appropriations from Congress. (App., infra, p. 12a)

Finally, the Court of Appeals turned to the actions of the Executive Branch in lobbying Congress to make funds unavailable to the Board. The Court obviously was troubled by this activity, but decided that even if this had been a violation of the Decree, there was no longer any effective remedy. (App., infra, p. 16a) The only remedy, the Court held, would have been to find the executive officers of the United States in civil contempt at the time and order them to refrain from the specific, negative activities in question or to direct them to inform Congress about the Consent Decree's obligations. (App., infra, p. 15a-16a) It ruled, however, that the time for those remedial measures had passed. Thus it overturned the District Court's attempts to place the Board in the same position as if the violations had not occurred and once available funds had not been made unavailable. Once again, its concern for what it perceived to be constitutional limits on the powers of the judiciary led the Court

of Appeals to find that there could be no effective remedy for the violations of the Decree. (App., infra, pp. 15a-16a)

The various activities of the Executive Branch were plainly seen by the Court of Appeals as inconsistent with the "spirit" of the Decree, but were nonetheless thought to be within the constitutional domain of the Executive Branch and consequently beyond the constitutional power of the judiciary to remedy. Thus it concluded its opinion with this advice to the Department of Justice:

> these actions [of the United States] could be interpreted to contravene the spirit of the Decree .... Such action, while perhaps within constitutional limits, cannot enhance the respect to which this Decree is entitled and do not benefit a signatory of the stature of the United States Department of Justice.

In essence, then, the Court of Appeals held that in principal measure the Constitution prevented the provision in question in the Consent Decree, Section 15.1, from being an effective, enforceable judgment. Its opinion in this regard rendered the Decree largely advisory in nature.

Given this decision of the Court of Appeals, the United States determined to provide the Board with no direct assistance for the Plan in the current school year. The consequence has been that the Board has had to terminate programs begun in school year 1983-84 with the Yates Bill appropriations. Moreover, it has been unable to begin implementation of those programs found by the District Court to materially aid in the success of the Board's desegregation efforts.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that a Writ of Certiorari should issue in this case to review these three holdings in the decision of the Seventh Circuit:

> 1. Notwithstanding the Consent Decree's requirement that the United States "make every good faith effort to find and provide every available form of financial resources"

for the Board's desegregation Plan, the Executive Branch was held entitled to exercise discretion to provide virtually no appropriated and legally available funds for the desegregation Plan.

2. Notwithstanding the obligations of the United States under the Consent Decree, the Executive Branch was held to be constitutionally entitled to lobby in Congress against the appropriation of funds for implementation of the Board's Plan.

3. The judicial power under Article III of the Constitution was held not to include authority to order appropriate remedial measures for the past violations by the United States of the Consent Decree.

Taken together, these holdings raise fundamental constitutional issues as to the structure of our federal government and the allocation of powers and responsibilities among its coordinate branches.

Underlying the constitutional issues in this case is the principle that, in our constitutional democracy, the government, as well as the governed, is bound by the rule of law. *United States* v. *Nixon,* 418 U.S. 683 (1974). It is in large measure upon the assurance of the rule of law that the moral legitimacy and thus the authority of a democratic government depends.

The rule of law is seriously undermined, however, if the Executive Branch can successfully avoid compliance with a voluntarily undertaken and binding obligation (given additional dignity as a consent judgment) by simply changing its policies and priorities. Such a result would make the contractual agreement of the government subservient to the discretion, from time to time, exercised by its executive officers.

The rule of law is similarly undercut if, notwithstanding a consent decree, the Executive Branch can effectively lobby to prevent funds from being appropriated for the purposes of the

decree, or lobby to reduce the amount of federal money otherwise available for those purposes. Such a result would make judgments of the Judicial Branch effective and enforceable only to the extent the other branches of the government voluntarily elect to make them so. Such a result is plainly inconsistent with the rule of law; it negates the authority of the courts upon which that rule depends. As Judge Shadur stated in his preface to the Remedial Order:

> To hold the United States to nothing more than its bargain does *not* violate the separation of powers, as the United States would have it, but rather fosters the rule of law this Court has sworn to uphold in its oath to support and defend the Constitution.... Rather the Executive Branch has committed itself to a contract in the exercise of its discretion, and it is to be held responsible for that decision.

[App., infra, p. 218a]

The ability of the Judicial Branch to ensure that lawful judgments against the Executive Branch are enforced is critical to a government of laws and thus the integrity of our constitutional structure. If the Judicial Branch lacks power to enforce judgments voluntarily entered by the Executive Branch, as is the consequence of the Court of Appeals' decision, then the independent and co-equal status of the Judicial Branch is endangered. The doctrine of separation of powers surely requires that the judicial power include the power to make effective the enforcement of consent judgments binding upon the United States. See Note, EXECUTABILITY OF ARTICLE III JUDGMENTS: THE PROBLEM OF PRESIDENTIAL AND CONGRESSIONAL DISCRETION, 98 Harv. L. Rev. ____ (Forthcoming April, 1985).

The result of the Court of Appeals' decision is a form of unconstitutional *nullification,* exercised now not by the States but by the Executive Branch. It would permit that branch both to define the scope of its own obligation under a court judgment and to decide whether it may be enforced.

The decision of the Court of Appeals over which review is sought thus involves fundamental issues concerning the relationship between the branches of the federal government. These concern both the Judicial Branch's ability to enforce judgments and the Executive Branch's ability to obviate its obligations through a claim of executive discretion. Such a sharp and serious clash of the powers claimed under the Constitution for the various branches of the federal government has not previously been addressed in these circumstances by this Court. It is, accordingly, timely and appropriate for consideration by this Court.

A. The Extent to Which a Consent Decree Should be Read as Constraining Executive Discretion is a Point on Which Guidance From this Court Would be Useful.

Central to this case is whether the Consent Decree constrains the discretion of the Executive Branch to determine, within the outer ranges allowed by Congress in funding statutes and appropriation laws, whether to provide funds for the Plan. Stated another way, can the government irrespective of the Decree make any decision it wants as to whether to provide funding for the Plan? Is it possible for the United States to "make every good faith effort to find and provide all available funds" for the Plan while, at the same time, taking all the funds which can lawfully be used for that purpose and spending them on something else?

The settled meaning of the phrase of the Consent Decree, "to make every good faith effort," is that the United States is required to take all steps in its lawful authority to satisfy its obligations. *Dotson v. U.S. Dept. of Housing and Urban Development,* 731 F.2d 313 (6th Cir. 1984); *Brewster v. Dukakis,* 675 F.2d 1 (1st Cir. 1982); *State of Arizona, Etc. v. United States,* 575 F.2d 855 (Ct. Cl. 1978); *Geisser v. United States,* 513 F.2d 862 (5th Cir. 1975), *appeal after remand,* 554 F.2d 698 (5th Cir. 1977), *appeal after remand,* 627 F.2d 745

(5th Cir. 1980), *cert. denied,* 450 U.S. 1031 (1981). The United States clearly has not met this obligation.

In opposition to this plain reading of the Decree, the United States has asserted a Doctrine of Executive Discretion, which is claimed to be part of the constitutional principle of separation of powers. Under this suggested Doctrine, the Consent Decree did not, because it could not, restrain the exercise of statutory discretion by the Executive Branch. Thus, only the Executive Branch is permitted to decide the extent to which, if at all, appropriated funds should be used to provide federal financial assistance under the Decree.

In accepting the United States' assertions, the Court of Appeals appears to have been guided by its concern as to the constitutional limitations on the ability of the Judiciary to apply and enforce the plain meaning of the Decree. It held that it was not a violation of the Decree for the Secretary of Education to allocate appropriated sums in a way that virtually none of the available sums were provided to the Board for the Plan,[7] resulting in a negation of the financing provisions of the Decree.

Thus the separation of powers issue in this case is squarely presented by the decision of the Court of Appeals. The issue does not now arise because of claimed infringement of Executive Branch prerogatives by the judiciary. Rather, the conflict is posed by the Executive Branch's claim that the terms of the Decree can not constrain its exercise of discretion in the funding of the Plan. The Board, however, submits that to enforce the Consent Decree does not intrude upon the lawful discretion of the Executive Branch; that discretion is constrained by law—the obligation to obey the Decree.

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[7] The Department of Education contends that its discretion allows it to provide no money to programs which fund desegregation expenses of local school districts (or otherwise to fund the Plan). Thus the priority which it would grant applications by the Board is the right to be at the top of a list of applicants for an empty fund.

Whether a consent decree can constrain the exercise by the Executive Branch of its claimed statutory discretion has not been directly addressed by this Court. However, this is an important and timely issue which calls for review by this Court.

This constitutional question of the extent to which the judicial power, through the enforcement of consent judgments, can restrict (or should be interpreted to restrict) executive discretion is a matter of considerable currency. Many government agencies have entered into consent decrees or other agreements purporting to impose obligations upon the United States. With increasing frequency, the Executive Branch, or other parties asserting its interest, have taken the position that these obligations cannot, as a matter of law, be enforced against the United States. In recent years, several Courts of Appeals, without guidance from this Court, have examined these consent decrees or other agreements which impose constraints upon the Executive Branch. As their decisions demonstrate, the question presented by this case has far reaching ramifications, and although it needs to be, has not yet been settled by this Court.

For example, in each of these recent decisions a Court of Appeals was faced with the argument that consent decrees could not constrain the appropriate exercise of executive discretion. In *Alliance to End Repression* v. *City of Chicago,* 742 F.2d 1007 (7th Cir. 1984) (consent decree enjoined FBI from conducting investigations of persons "solely on the basis of activities protected by the First Amendment"), the decree was interpreted to allow new FBI guidelines, out of due regard for separation of powers. In *Citizens For A Better Environment* v. *Gorsuch,* 718 F.2d 1117 (D.C. Cir. 1983) *cert. denied sub nom. Union Carbide Corp.* v. *Natural Resources Defense Council, Inc.,* 52 U.S.L.W. 3861 (May 29, 1984) (consent decree requiring procedures for environmental regulations), the decree was upheld in a 2-1 decision as not improperly constraining subsequent governmental decision-making. And in *National*

Audubon Society, Inc. v. *Watt,* 678 F.2d 299, 305 n.12 (D.C. Cir. 1982) (consent decree for United States not to undertake a water development project), and *Ferrell* v. *Pierce,* 743 F.2d 454 (7th Cir. 1984) (consent decree containing substantive and procedural restraints on HUD mortgage foreclosures), and *Women's Equity Action League* v. *Bell,* 743 F.2d 42 (D.C. Cir. 1984) (consent decree and accompanying injunction against the Department of Education specifying procedures for enforcing various civil rights laws), the issue was avoided either by interpretation of the decree or for procedural reasons.

This topic is both timely and important. The decision of the Court of Appeals strikingly reduces the ability of the judiciary to enforce consent decrees against the United States. To the extent consent decrees are subject to discretionary decisions of the Executive Branch in order to make them effective or enforceable, then judgments of the courts are subject to the discretionary policy decisions of the Executive Branch. This means that the judiciary is effectively unable to enforce such judgments (making them, needless to say, unappealing as a technique of resolving litigation). Such a result makes the rule of law subservient to the discretion of the Executive Branch.

Review by this Court would also guide the states and their political subdivisions with respect to their ability to rely upon the financial assistance obligations of the United States. Such obligations are important in a broad range of governmental activities. It is increasingly the case that governmental objectives of the United States are carried out by local governments, operating with the financial assistance of the United States. As noted in *Garcia* v. *San Antonio Metro. Transit Auth.,* No. 82-1913 (U.S. Sup. Ct. February 19, 1985), in recent years a significant portion of the revenues of local governments have derived from financial arrangements with the federal government. This common technique of federal programs being administered by State and local governments, with substantial

commitments of federal funds, allows the administration of federal objectives in a decentralized fashion by the states and their political subdivisions. Such arrangements must, however, be predicated upon the binding character of federal contractual commitments.

Review by this Court is thus necessary and appropriate both to clarify the extent to which the Executive Branch's discretion may be limited by consent decrees and to provide guidance on the binding nature of the obligations of the United States to political subdivisions of the States.

B. This Court Should Decide the Important Question of Whether a Court Order can Require the Executive Branch to Make Legislative Recommendations.

This case also presents the important constitutional issue as to whether the Consent Decree can constitutionally require the Executive Branch to undertake or not oppose legislative initiatives to implement the Plan. Both the Board and the United States have acknowledged the significance of this constitutional question. As the United States has stated, the case

> raises the most profound issues concerning basic separation of powers principles and the authority of the judiciary to direct . . . the Executive's relations with Congress.

(Suggestion of the United States for Initial *En Banc* Consideration, filed August 23, 1984, at p. 3.)

Moreover, this question has been raised in recent opinions of the Courts of Appeals, but has not been decided by this Court. For example, in *Covelo Indian Community* v. *Watt*, 551 F.Supp. 366 (D.D.C. 1982), *aff'd*, No. 82-2377 (D.C. Cir. Dec. 2, 1982), *vacated as moot*, No. 82-2377 (D.C. Cir. Feb. 1, 1983), the District Court considered whether a statute requiring the Secretary of the Interior to propose legislation to Congress unconstitutionally contravened the Executive Branch's discretion in light of Article II, Section 3. It held that it did not,

and that the statute was enforceable, because the President had signed it into law and voluntarily limited executive discretion to propose or not propose legislation. *Id.* at 378 n. 9; *see also, Ferrell v. Pierce,* 743 F.2d 454, 458 (7th Cir. 1984)

Two additional reasons suggest that this issue should now be decided by this Court. First, if the Executive Branch can freely undertake legislative initiatives in its discretion which would inhibit its ability to carry out its solemn agreements, then those obligations lack substance. This hardly profits the United States. If the Executive Branch is able to take steps to limit its ability to meet the contractual obligations of the United States, then the credit-worthiness of the government is reduced.

The second reason is that the issue implicates the constitutional powers of the judiciary. If the judiciary is unable to require that the Executive Branch either seek appropriations to meet its obligations under valid judgments, or to at least not actively oppose legislation which would increase its ability to satisfy those obligations, then the powers of the judiciary in this regard are limited indeed.

Various courts have entered orders with respect to the legislative activities of state executive officers. *Delaware Valley Citizens Council Etc. v. Commonwealth of Pennsylvania,* 678 F.2d 470 (3rd Cir. 1982), *cert. denied,* 459 U.S. 969 (1982); *Brewster v. Dukakis,* 675 F.2d 1 (1st Cir. 1982). These orders presented constitutional questions regarding the proper realms of state and federal power, which may be somewhat different from the issues in this case concerning the appropriate constitutional domains of coordinate and co-equal branches of the federal government.[8] Nonetheless, these cases affirmed the Article III power of the judiciary to enforce its lawful judgments by requiring executive officers to undertake legislative recom-

[8] See, Nagel, SEPARATION OF POWERS AND THE SCOPE OF FEDERAL EQUITABLE REMEDIES, 30 Stan. L. Rev. 661, 681 et seq. (1978).

mendations. Similarily, separation of powers principles would be violated if the judicial power could not compel the Executive Branch to obey valid court orders.

C. Guidance by this Court Should be Given as to the Remedies Which May Be Provided for Actions by the Executive Branch in Violation of the Decree.

The general rule of law is that if a party violates a judicial decree, the proper remedy includes placing the harmed party in the same position in which it would have been had there been no violation. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1949). In this case, the District Court concluded that by a variety of actions, including lobbying against the Plan, the Executive Branch had violated the Decree. The Remedial Order sought to place the Board in no worse a position as a result of these violations than it would have been had the Decree not been violated. It sought to do this by, among other things, declaring that the United States had a duty to provide funding for the current school year and to adopt a plan for future years' funding of the Decree.

The Court of Appeals, however, vacated that Remedial Order. It held that the only available remedy would have been a civil contempt proceeding in which the Court could have ordered the government to stop the negative lobbying efforts and to inform Congress as to the funding obligations of the United States under the Decree. Such a proceeding was held not to be timely. In short, the Court of Appeals decided that the violations could no longer be remedied.

A critical issue is thus raised by this case as to whether there is a limitation on the powers of an Article III court to remedy violations of the Decree by steps which go beyond merely stopping the complained of activity. This question has not been decided by this Court in the context of a consent decree which binds the United States.

This issue concerning the limits of judicial remedies in such a situation is important for this Court to decide. As this Court held in *United States* v. *Nixon*, 418 U.S. 683 (1974), the executive officers of the United States, like every other citizen, must obey the law and judgments of the courts. This principle is clearly undermined if Article III courts are barred from taking effective steps to remedy violations of the Decree. Without those remedial powers there is no judicial remedy for failure of the Executive Branch to abide by judgments. This is contrary to the basic doctrine of the separation of powers. It would make the Judicial Branch's orders subservient to the discretion of the Executive Branch. If judicial orders can be entered against the Executive Branch, then effective remedies must be granted for violations of those orders. (This point is discussed in detail, with respect to this case, in a forthcoming Note. Note, EXECUTABILITY OF ARTICLE III JUDGMENTS: THE PROBLEM OF PRESIDENTIAL AND EXECUTIVE DISCRETION, 98 Harv. L. Rev. ____ (Forthcoming April, 1985)).

CONCLUSION

A Writ of Certiorari should issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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